In The Supreme Court of The United States

October Term, 1948

NO. 369 123

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

Petitioner

versus

ECONOMY CAB COMPANY OF JACKSONVILLE, and THRIFT CABS, INC.

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

A. The Facts

Economy Cab Company of Jacksonville and Thrift Cabs, Inc., brought separate actions against the Collector of Internal Revenue to recover social security taxes paid by the taxicab companies to the defendant under the Federal Insurance Contributions Act, 26 U.S.C. Sec. 1410, et seq. (*infra*, p. 17) and the Federal Unemployment Tax Act, 26 U.S.C. Sec. 1600, et seq. (*infra*, p. 18) with respect to the taxicab drivers (R. 1, 6). The two actions were consolidated for trial (R. 13) and for appeal and further proceedings (R. 263, 264).

Economy Cab Company of Jacksonville is a Florida Corporation which was organized in 1932 and Thrift Cabs, Inc., is a Florida Corporation which was organized in 1933 (R. 1, 6, 31). Since organization these companies have been furnishing a taxicab service in the City of Jacksonville and its environs under authority of city ordinances and certificates of public convenience and necessity (R. 31, 246-250).

The method of the operations is, briefly, as follows: Each company is the owner of approximately fifty five-passenger automobiles which are painted in the color design adopted by each company and bear the name of the company and its telephone number (R. 21, 22, 84, 85). These automobiles are rented or leased to individual drivers for a ten hour shift and operated by the drivers in the City of Jacksonville and surrounding territory as cruising taxicabs (R. 22, 23, 26). The companies furnish the drivers a taxicab which is in good condition, maintain and repair the cab and rent or lease the vehicle to the driver for a day shift or a night shift (R. 22, 46, 50). The driver calls for the automobile at the company garage, pays the company a stipulated rental for a ten hour period and takes complete control of the vehicle for a rental period. (R. 21-23, 29, 46-50, 60-64).

The companies pay the drivers no salary, wage or compensation of any nature whatsoever (R. 23, 50, 51, 65). The drivers operate the automobiles in Jacksonville and vicinity as cruising taxicabs without control or direction from the companies (R. 23, 28, 47-49, 61-63). The drivers collect and pocket their own fares (R. 30, 50, 65, 157), drive wherever they choose whenever they choose and carry passengers of their own choice and selection (R. 27, 28, 49, 61, 62). The companies do not and cannot require the drivers to operate in any particular section of the city or to carry

any particular passengers (R. 26, 47, 48, 61-63, 189, 190). The drivers can and frequently do decline to accept passengers if the trip is not considered profitable or desirable (R. 25, 48, 62). A passenger may engage a cab as a private cab by agreement with the driver for a single trip or for an extended length of time or the driver may choose to carry several passengers to their various destinations on one trip (R. 28, 49, 61-63, 169, 170, 189, 190, 202). All fares are collected and retained by the driver (R. 30, 65, 124, 157).

The rates charged by the drivers are fixed by agreement between the drivers and the companies and are based upon a "zone" system (R. 28, 29). The companies have no control over the earnings of the drivers and have no interest in the earnings of the drivers, the earnings of the drivers being determined solely by the initiative, alertness and diligence of the drivers in procuring passengers and transporting them to their destinations (R. 30, 31, 105, 106, 221).

The companies maintain an office with a switchboard for receiving calls and also maintain ten call boxes scattered throughout the city. When a call is received from a prospective passenger it is offered to the driver nearest the passenger's location when the driver calls the company office. The driver is free to accept it or reject it and frequently calls are declined by drivers in which event the call is offered to another driver (R. 25, 55, 56).

The drivers are not restricted in their operations to the city of Jacksonville or to the County of Duval but may and frequently do transport passengers to other cities in the state or even to other states. The decision to accept or refuse such trips rests exclusively with the driver and the fare collected is exclusively his (R. 23-25, 47, 48, 62, 63).

The companies have never operated their business upon any basis other than leasing or renting the cabs to the drivers and this has been the procedure from the inception of the business. The companies have never shared in the earnings of the drivers nor have the drivers ever shared in the earnings of the companies; and the companies have never received any percentage of the fares collected by the drivers nor do the companies reserve any right to do so. (R. 30, 31, 37, 50, 51, 75, 157, 184).

The drivers are not required to operate the vehicles as taxicabs; they can and do check the cabs in when they desire and also use them for their personal pleasure and convenience (R. 29, 30, 46, 50, 66, 196). If a driver is arrested for a violation of traffic laws, the companies do not pay his fine or furnish him representation. The driver procures this for himself (R. 29, 50, 51). At times the companies attempted to prevail on the drivers to wear appropriate shirts and caps and to check in over the telephone at intervals but these efforts were unsuccessful because of lack of control over the drivers (R. 225, 226).

There is a contract between the companies and the drivers' union which serves as a master contract for the leasing of the cabs. (R. 43-45, 234-245) The companies advertise a taxicab service, furnish switchboard service, a starter at the bus station and provide liability insurance for the cabs; these are services the drivers pay for and expect to obtain when they lease the cabs. (R. 152, 160, 188, 189).

B. Questions Involved

The only questions involved in this case are: (1) whether the drivers of the taxicabs are "employees" of the companies within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act;

and (2) whether any "wages" were paid by the companies to the drivers within the meaning of those Acts.

C. Ruling Of The Courts Below

The District Judge applied the "economic reality" theory of *United States* v. *Silk*, 331 U.S. 704, 91 L. Ed. 1757, and held that the drivers were "employees" of the taxicab companies within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and that the earnings of the drivers constituted "wages". (R. 254-261) Judgment was entered for the defendant in each case (R. 262).

Upon appeal the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court upon the ground that the Act of Congress known as the Social Security Amendment (Pub. Law 642, 80th Cong., 2nd Sess., enacted June 14, 1948, *infra*, p. 19) required the application of common-law rules in the determination of whether the drivers were employees (174 Fed. 2d 319) and concluded that "Applying the common law rules as commanded by the recent legislation, it cannot be held that these drivers are employees and that the money they earn is wages." (174 Fed. 2d 321) *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318 and *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321.

ARGUMENT

Petitioner asks that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on two grounds: (1) that the decision in this case is claimed to be in conflict with the decision in the case of *Jones* v. *Goodson*, 121 Fed. 2d. 176 (C. A. 10); and (2) that this Court should furnish a guide for the application of the common law control test

in determining whether taxicab drivers are employees and the significance to be attached to differences in facts. (Pet. 11)

Respondents contend that no basis for granting the Petition for Certiorari exists and urges the denial of the Petition for the reasons assigned below.

THERE IS NO CONFLICT IN DECISIONS

The burden of Petitioner's argument is that upon the facts of this case, the Court below reached an erroneous conclusion but error is not shown. Petitioner admits that the proper and correct principles of law were applied by the Court of Appeals in the decision of the case, but complains of the result. In an effort to persuade this Court to review the case the Petitioner states that the decision in the case at bar is in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Jones* v. *Goodson*, 121 Fed. 2d 176.

This assertion is unsupportable. The two cases are not in conflict; they were decided on different factual situations. If any conflict in the cases exists, it is a conflict in the facts and not a conflict in the decisions. Each case in which the question arises of whether certain persons or groups of persons come within the designation of "employees" must necessarily rest upon its own facts. The facts in *Jones* v. *Goodson* impelled the Court to conclude that the taxicab drivers there in question were employees, while a different set of facts in the case at bar led the Court to conclude that taxicab drivers here concerned were not employees. This result was reached because different facts and a different relationship existed in the two cases.

It is not necessary to review in detail the facts in each of the cases but certain important variations in the two

cases may be readily observed. In *Jones* v. *Goodson*, the taxicab company exercised continuous and extensive control over the drivers and imposed numerous restrictions upon the operations of the taxicabs. The company limited the sphere and scope of the drivers' operations and prescribed a maximum mileage which the cabs should be driven. The taxicab company also reserved the right to operate the cabs on a percentage basis and to require a division of fares with the company. The drivers were prohibited from using the vehicles for any purpose other than the conduct of the taxicab business. Upon such facts the drivers were held to be employees of the Company. The Court found that the company exercised and had the right to exercise constant and continuous control not only as to the result to be accomplished by the work of the drivers but also as to the details and means by which that result was to be accomplished. Upon the application of the common law control test, the Tenth Circuit decided that the drivers were employees.

In the present case, however, and in the cases of *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318, and *Party Cab Co.* v. *United States*, 172 Fed. 2d 87, the above mentioned elements of continuous control and supervision are not present; an entirely different factual situation exists. As stated by the Court of Appeals for the Fifth Circuit in referring to the drivers in the instant case and in the *New Deal* case:

> "He was under no control by the Company and had no instructions as to where he should seek patrons, what he should charge them, or what he should do with the car. He could use it for his own purpose, for a trip, or even to go fishing." (174 Fed. 2d 320)

With respect to the almost complete absence of control exercised by the company over the drivers in the *Party*

Cab Company case, the Court of Appeals for the Seventh Circuit said:

> "During this so-called period of employment the plaintiff had no control over the area of operation of the number of miles which the cab was to be operated. It could not require the drivers to accept a call for a taxi received by it, to telephone the office or report his whereabouts and could not require a driver to purchase gasoline or oil from it, or to account for fares collected or for tips or gratuities received. In fact, it appears that a driver had the same freedom as to the manner and means to be employed in the operation of a taxicab as would be possessed by any other car owner or driver." (172 Fed. 2d 92, 93)

Hence, the facts in the case of *Jones* v. *Goodson* are materially and substantially different from the facts in the instant case and in the *New Deal* and *Party Cab Co.* cases. The Courts concluded that substantial control was exercised over the drivers in the one case, while practically no control existed in the other cases. We reiterate that any conflict in the cases is a conflict in the facts and not a conflict in the decisions.

It has been repeatedly recognized that *Jones* v. *Goodson* must be distinguished on its facts from cases such as the present case. No quarrel or dissent has been found or expressed on the law announced by the Court in *Jones* v. *Goodson*, but the case has been repeatedly distinguished on its facts. *Jones* v. *Goodson* was distinguished on its facts by the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Yellow Cab Co.*, 141 Fed. 2d 324; it was distinguished upon its facts by the Court of Appeals for the District of Columbia in *United States* v. *Davis*, 154 Fed. 2d 314; and recently, in the case of *Woods* v. *Nicholas*, 163 Fed. 2d 615, it was distinguished on its facts by the very court which rendered the decision in *Jones* v. *Goodson*.

Far from a conflict in decisions existing, the decisions are uniform and in substantial agreement with respect to the determination of whether taxicab drivers are employees. Where no control over the drivers exists, where the drivers rent or lease vehicles and conduct their business wherever they choose, use the vehicles for such purposes as they desire, having complete freedom of action without any obligation to account to the company for funds received and monies collected, the drivers are held not to be employees. *Magruder* v. *Yellow Cab Co.*, 141 Fed. 2d 324 (C. A. 4), *United States* v. *Davis*, 154 Fed. 2d 314 (C. A. D. C.), *Woods* v. *Nicholas*, 163 Fed. 2d 615 (C. A. 10), *Party Cab Co.* v. *United States*, 172 Fed. 2d 87 (C. A. 7), *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318 (C. A. 5), *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321 (C. A. 5). But where the company asserts strict supervision over the drivers, controls their policies and action, limits their mileage, restricts the sphere of their operations, forbids the use of the cabs for any purpose other than taxicabs, requires the constant operation of the cabs and has a right to operate the cabs on a percentage basis and to require a division of the fares with the company, such drivers are held to be employees. *Jones* v. *Goodson*, 121 Fed. 2d 176 (C. A. 10).

Petitioner's claim that there is a conflict in decisions between *Jones* v. *Goodson* and the instant case is without merit. The plain truth is that the facts in the two cases are in material variance. Certiorari is not granted where the asserted conflict in decisions is a conflict in the facts rather than a conflict in the pronouncement and application of principles of law. In *Wisconsin Electric Company* v. *Dumore Company*, 282 U.S. 813, 75 L. Ed. 728, this Court said:

> "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

An examination of the opinion of the Tenth Circuit Court of Appeals in *Jones* v. *Goodson*, 121 Fed. 2d 176, and an examination of the opinions of the Fifth Circuit Court of Appeals in *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318, and *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321, reveals that the two Circuits reached different conclusions upon substantially different facts.

NO IMPORTANT QUESTION OF LAW IS PRESENTED

There is no controversy in this case with respect to legal principles. The same principles of law were applied by the Court of Appeals for the Tenth Circuit in *Jones* v. *Goodson* as were applied by the Court of Appeals for the Fifth Circuit in the present case and in the case of *New Deal Cab Co.* v. *Fahs*, and by the Court of Appeals for the Seventh Circuit in *Party Cab Co.* v. *United States*. The Tenth Circuit, the Fifth Circuit and the Seventh Circuit applied the common law control test in deciding whether the persons in question were employees within the meaning of the Social Security Legislation. This was undoubtedly correct. Petitioner does not contend otherwise.

This Court was recently of the opinion that standards other than those recognized by the common law rules should be applied in the determination of employees under Social Security Legislation. *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U. S. 704, 91 L. Ed. 1757. But Congress, after the decision in the above cases, expressed its explicit intention and direction that common law rules were

to be applied in the determination of employees from the date of the initial adoption of the Social Security Act. (Social Security Amendment, Pub. Law 642, 80th Cong. 2nd Sess., enacted June 14, 1948, *infra*, p. 19.)

The Treasury Regulations (Reg. 106, Sec. 402.204 and Reg. 107, Sec. 403.204, *infra*, p. 19-21) stating the elements of the common law control test for use in determining whether the taxicab drivers were employees were recognized and applied by the Courts in *Jones* v. *Goodson*, in the *New Deal* case, in the *Party Cab Co.* case and in the instant case. The principles of law which must be applied in reaching a decision in such cases are clear; these principles of law were recognized and applied by the Court below and also by the Court of Appeals for the Seventh Circuit in *Party Cab Co.* v. *United States* and by the Court of Appeals for the Tenth Circuit in *Jones* v. *Goodson*. There is no question of law either important or unimportant which is in doubt in this case, nor are there any conflicting enunciations of law in any of these cases which should or could be settled by granting certiorari.

When this Court in the year 1946, granted certiorari in other cases to review decisions that certain persons were not "employees" within the meaning of the Social Security Act it was for the purpose of deciding the applicable standards for the determination of employees under the Act. "Writs of Certiorari were granted—because of the general importance in the collection of social security taxes of deciding what are the applicable standards for the determination of employees under the Act." *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U.S. 704, 91 L. Ed. 1757. But Congress has now by the Social Security Amendment positively and definitely prescribed the "applicable standards for the determination of employees un-

der the Act." Those applicable standards are not in doubt; they are the common law rules which have been properly and accurately stated in the Treasury Regulations.

Consequently, the principles of law applicable to this and similar cases have been definitely and finally announced by Congress and fully and fairly stated in the Treasury Regulations. These principles of law have been properly and fairly applied by the Court below. They are known to the bench, bar and public. There are no important principles of law which can be decided by this Court in this case if certiorari should be granted.

PETITIONER ASKS MERELY TO HAVE THIS COURT REVIEW THE EVIDENCE AND RE-EXAMINE THE FACTS. CERTIORARI WILL NOT BE GRANTED FOR THIS PURPOSE

Cases in which the question of whether certain individuals or groups of persons are employees is raised differ in their facts. The decision in each case must necessarily rest upon the particular facts of that particular case. That is true in the instant case. Upon the facts of this case, the Court below found the drivers not to be employees. If certiorari should be granted in this case, this Court could not resolve any conflict in decisions because as, has heretofore been shown, there is no conflict in the pronouncement or application of principles of law among the cases; the asserted conflict arises from differences in states of fact.

Neither can the granting of certiorari serve to settle any important principle of law. The correct principles of law were applied by the Court below in the decision of this case; the common law rules were applied. These were admittedly the proper rules of law to be applied to this case and the same rules of law must be applied to every other

case arising under the Social Security Act for the determination of employees under the Act. The statement of the common law rules governing the existence or non-existence of an employer-employee relationship is fully and accurately stated in the Treasury Regulations (*infra*, p. 19-21). The statement of the governing principles found in the Treasury Regulations was quoted, approved, adopted and applied by the Court of Appeals for the Fifth Circuit in this case with the remark "This is an excellent statement of the legal relations mentioned." (174 Fed. 2d 319) So the principles of law applicable to cases raising the question of the existence of an employer-employee relationship are settled, plain, clear and explicit. No principle of law needs settling in this case.

But Petitioner asks this Court to take jurisdiction for the purpose of furnishing "a guide for the application of the common law test of an 'employee' to cab drivers" by determining the effect of differences in factual details. The utter impossibility of this Court furnishing any such "guide" is apparent. In effect, the Petitioner asks this Court to place a value, a significance, an appraisal upon each factual detail. A case such as this is the end product of a large accumulation of facts; but each case presents different facts and varying combinations of facts, circumstances and conditions. If this Court should undertake the laborious and impractical task of picking out each fact in the case, weighing it, classifying it, evaluating it and tagging it with some degree of significance, relevancy or importance, a "guide" such as Petitioner asks this Court to furnish for the application of the common law test would still not be created. The next case to arise involving the question of whether another group of persons are employees would inevitably present new and different facts and a different combination of facts. Would Petitioner

then again and again ask this Court to review each case until all possible facts and all combinations of facts had been presented for evaluation, classification and appraisal? This Court cannot spend its life in reviewing and weighing facts and evidence.

Regardless of the efforts of Petitioner to depict adroitly a picture of a conflict in decisions, nothing more than a superficial reading of the Petition for Certiorari in this case and in the case of *New Deal Cab Co.* v. *Fahs* and *Party Cab Co.* v. *United States* (in which certiorari has also been applied for) is needed to demonstrate that Petitioner's real complaint asserted in the Petition is that the present case and the other two cases in which certiorari has been applied for were erroneously decided on the facts.

It is generally understood by the Bar and by the public that under Supreme Court Rule No. 38, this Court will not grant certiorari simply because Petitioner contends that the Court below erred in the result reached on the particular facts of the case. The Supreme Court does not grant certiorari in cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. *Deputy* v. *duPont*, 308 U.S. 488, 84 L. Ed. 416 (dissent). It has long been the rule in this Court that certiorari is not awarded to review evidence or to examine facts. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413. In *United States of America* v. *Johnston*, 268 U.S. 220, 69 L. Ed. 925, this Court speaking through Mr. Justice Holmes said: "We do not grant certiorari to review evidence and discuss specific facts."

Necessarily, the decision in this case can have but slight if any bearing upon proper decision of any other case. Each

case in which the question arises of whether a particular person or group of persons comes within the designation "employee" must, perforce, be determined upon the peculiar facts of that case and the variation in facts and circumstances pertaining to the thousands of relationships, all different in degree, is legion. If certiorari should be granted in this case this Court could only announce the principles of law to be applied in arriving at a determination of whether a person is an employee under the Social Security Act in any of the many thousands of varying situations. But there is no necessity for this Court announcing the principles to be applied. The Congress has already done this.

Petitioner asks this Court to review the evidence, weigh the facts, evaluate the testimony and to overthrow the conclusion of the Court below. This case has no especial significance to the bench, to the bar or to the public. Admittedly, correct principles of law were applied in the decision of this case. This Court does not and cannot review the correctness of the result in each case decided by Courts of Appeal in the several Circuits.

CONCLUSION

There is no conflict in decisions. No important principle of law is presented for determination. The review of this case by this Court cannot possibly furnish a guide for the decision of other cases. Certiorari is not and should not be granted to review the evidence and to discuss specific facts. Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

("Federal Insurance Contributions Act")

Sec. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in Section 1426 (b)) after such date:

* * * * * * * * * * *

(26 U. S. C. 1410.)

SEC. 1426 (as amended by Sec. 606, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1383.) DEFINITIONS.

When used in this subchapter—

(a) *Wages*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash;

* * * * * * * * * * *

(b) *Employment* — The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *

(d) *Employee*—The term "employee" includes an officer of a corporation.

* * * * * * * * * * * *

(26 U. S. C. 1426.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

("Federal Unemployment Tax Act")

SEC. 1600 (as amended by Sec. 608, Social Security Act Amendments of 1939, *supra*).

RATE OF TAX

Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in Section 1607(b)) paid by him during the calendar year with respect to employment (as defined in Section 1607(c)) after December 31, 1938.

(26 U. S. C. 1600.)

SEC. 1607 (as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*).

DEFINITIONS.

When used in this subchapter—

* * * * * * * * * * * *

(b) *Wages*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * * * * * * * * *

(c) *Employment* — The term "employment" means any service performed prior to January 1, 1940, which was

employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * *

* * * * * * * * * * * *

(i) *Employee*—The term "employee" includes an officer of a corporation.

* * * * * * * * * * * *

(26 U. S. C. 1607.)

Public Law 642, 80th Congress, 2nd Sess.

Section 1.

(a) Section 1426(d) and section 1607 (i) of the Internal Revenue Code are amended by inserting before the period at the end of each the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules".

(b) The amendments made by subsection (a) shall have the same effect as if included in the Internal Revenue Code on February 10, 1939, the date of its enactment.

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. **WHO ARE EMPLOYEES**—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for

whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no

consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * * * * * * * * *

The provisions of Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, are substantially the same as the provisions of Section 402.204 of Treasury Regulations 106.